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IN THE

Supreme Court of the United States

October Term, 1943

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NO. 409

—o—

TENNESSEE COAL, IRON & RAILROAD COMPANY, Et al

Petitioners,

vs.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, Et al,

Respondents.

—o—

REPLY BRIEF FOR THE PETITIONER TENNESSEE COAL, IRON & RAILROAD COMPANY.

—o—

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In replying to the respondents' and intervenor's briefs Petitioner follows the order and designation of subjects by each.

—o—

REPLY TO RESPONDENTS' BRIEF

I

"STATEMENT OF THE CASE"

Respondents state:

"The petitioners have not given a full, and complete portrayal of the facts in their statement of the case. And while the respondents are not required by the rules of this Court

to give a statement of facts, we believe that a more accurate statement will save this Court time and labor, give a clearer understanding of the case and demonstrate the correctness of the findings and opinion of the courts below."

Respondents' "STATEMENT OF FACTS AS TO TENNESSEE COMPANY" makes no reference to the following facts which are of the most importance and relevancy:

(a) That as long as any one can remember "portal to portal" travel times had not been included in the computation and payment of working time either in the iron ore or bituminous coal mines.—(Petitioner's Brief, pp. 10-13);

(b) That the traditional "face to face" method, both prior and subsequent to the enactment of the Act, had been universally recognized by public and quasi public authorities, relevant statutory enactments and administrative interpretations of like laws.—(Petitioner's Brief, pp. 13-25);

(c) That the interested parties, both prior and subsequent to the enactment of the Act, construed it in accordance with the traditional custom, and carried forward this construction into collectively bargained wage agreements.—(Petitioner's Brief, pp. 4-49);

(d) That the legislative history of the Act and its context clearly indicated that the intention of the Congress was not to overturn the traditional custom, render invalid contracts and wage agreements reached through the process of collective bargaining, or to substitute for the customs, traditions and concept of the industry and the parties concerned the variant judgments of juries or trial tribunals.—(Petitioner's Brief, pp. 25-31);

(e) That the inevitable result of compelling as a matter of law the "portal to portal" basis is to cause, instead of to prevent, "unfair competition in commerce" and to bring

about a result wholly contrary to the purposes of the Act.—(Respondent's Brief, pp. 60-62).

None of the undisputed facts summarized above have been or can be denied. Respondents seek to avoid these indices to Legislative intent by resting their case on the discomforts and hazards of underground travel, the alleged carrying of tools to and from the portal and the alleged control exercised by the petitioners over the miners.

Petitioner anticipated this position and summarized the evidence in its principal brief.—(Petitioner's Brief, pp. 34 to 42).

The statements there made apply with equal if not greater force to respondents' and intervener's brief.

"THE ASSEMBLY"

Although it was found below that the men were required to be at the portal at a set time, the respondents' own statement on page 4 shows that is not the case. It is said that "they must be ready to ride the mantrips when they start running." What is obviously meant is that they are expected to catch a trip in time to report for work to their respective foremen or head miners at the working places at the beginning of the work day.

It is undisputed that they board whatever skip they please, the Company supervisor merely counting them in properly to fill the skips and to prevent overcrowding, and that if a man does not arrive at the portal until the regular trips are over, a special trip is made for him.—(R. 975).

It is stated in respondents' brief, "All head miners that was chose as head miners was required to be at the tally house at 6 o'clock to check the men.—(R. 2428)."

Nine head miners of the Tennessee Company testified as witnesses for respondents. Only one of these (Patterson) gave evidence of this kind, and Patterson admitted that this related only to the men who were chosen as head miners when the incentive plan was first placed in operation in 1936 and only for the period of the installation of the plan.—(Patterson, R. 2428-32).

It is stated that the checks are turned in to the timekeeper, possibly to infer that he records the time, but the undisputed evidence shows that the checks were turned in to the tally house men, mine foremen and assistant mine foremen, and the only time records the timekeeper has are the ones turned in by the foremen and head miners.—(R. 791).

"RECEIVING ORDERS"

The references on page 5 of respondents' brief disprove the statement they are intended to support.

They show that a mine foreman may occasionally inform a service foreman or a head miner of some roof or other condition or of a change from one heading to another or the like. It would be strange indeed if men working together daily did not talk about their work when they happen to meet.

The record shows that the respondents examined as witnesses in their behalf only nineteen employees of the Tennessee Company. Of these twelve were productive employees—nine head miners (or crew foremen), two drag operators and one section helper; seven were service employees—three service crew foremen, two skip tenders, one combination trip rider and timber crew man, and one outside hoist;

ing engineer. Out of the nineteen examined twelve were crew foremen.

Many of these did not testify concerning giving or receiving orders:—(R. 2639, 2651, 2757, 2500, 3126).

Those who did testify to receiving orders or instructions stated that these orders were in reference to supplying vacancies in crews, were casual and occasional, related to information as to condition of the top as ascertained by the previous shift and information as to the receipt of equipment which had been previously ordered.—(R. 3194, 3141, 3114, 3102, 2728-29-30, 2739-41, 2627, 2745-6, 2435-6).

Others testified positively that no orders were given or received.—(R. 3154, 3180, 2543, 2593).

"CARRYING TOOLS"

The respondents say this was frequent. The District Court found it was occasional (R. 500), and the Circuit Court of Appeals held that these activities, together with obtaining carbide for the lamps, did not constitute the time spent on the petitioner's premises on the surface work time.—(R. 4947, 4841-2).

The respondents do not deny that the Company provides for the regular transport during working hours of tools to the working places.—(R. 2519-20-21, 2730-31, 3121, 3151).

As illustrative of this testimony we quote:

"Q When you got to your working place you were the boss up there except as the mine foreman or assistant mine foreman came around?

"A As far as the heading crew, yes, sir.

"Q If you ran out of anything up there you sent some of your crew back to get it?

"A I could.

"Q You did, didn't you?

"A Very seldom.

"Q The reason you didn't do it, you had your men to pick it up on the way in?

"A Yes, sir.

"Q And kept you from running out?

"A Yes, sir.

"Q You had the right to send them back?

"A Yes, sir.

"Q But picking up this light stuff on the way up, it saved time walking back and going back and saved the time of doing that for producing ore?

"A Yes, sir."—(Kirby, Head Miner, R. 2730-31).

Trammell, an underground dispatcher, after testifying that it was his duty to send the tools and material to the men as needed, stated:

"Q When they got to the bottom with the hangers and wedges and stuff of that kind, I believe you say sometimes in preference to having your crew bring them up they would take them up themselves?

"A Yes, sir. They might have six hangers and fifty wedges and they would take one hanger and two or three

wedges and leave the rest of them for me to send in."—(R. 3121).

White, a head miner, testified:

"Q And they (motor crew) will bring it (materials and tools) any time you want them to bring it, won't they, Mr. White?

"A Yes, sir.

"Q That is their duty, and whenever you want them to bring it?

"A Yes, sir."—(R. 3151).

See also to the same effect R. 2608-9, 2655-57, 2742-3, 2752, 3142.

Respondents cite R. 3117, which is the testimony of Trammel, in support of their assertion that the carrying of tools, etc., "was a frequent occurrence," nothwithstanding that his statement it was a "frequent occurrence" is immediately qualified by his statement that the Company had an underground supply house, and by his statements on cross-examination quoted above.

Respondents, in the foot-note to their brief (p. 6) include as the supplies claimed to have been frequently carried "fifty pound boxes of powder, dynamite," and other material which the undisputed evidence shows was kept in the powder magazine, could not be obtained except on requisition, and could never be carried to the working places except during the eight-hour work period, one or two members of each productive crew being sent from their places of work on Company time to obtain the powder, dynamite, etc., when needed.—(R. 1090).

Respondents emphasize the necessity of the miners carrying lights (Respondents' Brief, 5-32). Common knowl-

edge and sense inform us that this necessity has and always will exist in underground mines and other places where darkness or semi-darkness exists; so also are work clothes, heavy spiked safety shoes, etc., necessary equipment, likewise the carpenter's tools, the painter's ladders, and in the case of many miners (i.e., Sloss and Republic) the pick and shovel which by agreement the miner furnishes and carries. Prior to the direction of the War Labor Board in its order directing the Mine Workers Union and the Bituminous Coal Operators to execute a contract on the face-to-face basis, electric cap lamps, etc., were universally furnished by the miners. The Ickes-Lewis agreement of November 3, 1943, and the other contracts recently executed (Respondents' brief, Page 47), for the first time in the history of the industry, carry a provision requiring electric cap lamps and carbide lamps to be furnished by the management without charge; the provision reading as follows:

> "Safety equipment and devices including electric cap lamps, and also carbide lamps shall be furnished by the management without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. In lieu of furnishing carbide lamps and carbide, the operator may, at his option, pay to the mine workers who use carbide lamps at their work six cents per day, and the mine workers shall continue to furnish their own carbide lamps and carbide."

"UNDERGROUND CONVEYANCE"

Under this heading respondents paint a lurid and exaggerated picture of dangers and difficulties in transportation, difficulties and dangers in walking, and lack of toilet facilities underground.

The undisputed evidence shows that these general conditions incidental to underground mining have not been lessened or ameliorated by the institution of "portal to por-

tal" and that the conditions existed substantially the same after May 1, 1941, (the effective date of the Administrator's ruling) as they did before, and that they were fully recognized by the miners as being incidental to, and a part of, underground mining.—(R. 2469).

In addition to this, the respondents have grossly exaggerated the perils and discomforts. They state that men have been injured getting into these skips and while riding in them.

The only specific evidence that respondents were able to produce of skip injuries were instances occurring after the institution of "portal to portal," and the undisputed evidence, when the testimony on cross-examination is taken into consideration, shows a *de minimis* of injuries on skips (R. 2645-6, 2788-92), and no injuries from electric wires or otherwise while walking to and from the places of work. The record also shows that there was only one temporary lost time accident charged to "skip, cage or bucket" in the entire iron ore mining industry in a year's time.—(R. 4875).

The instances cited by respondents will be found to have been exceptional occurrences, and petitioner states emphatically that the record shows that conditions in its mines as to safety and comfort are equal to if not better than those which have always been recognized as a matter of common knowledge to have existed incidentally and necessarily in all underground ore mines.—(T. C. I. Exhibit No. 22, R. 3750-a, etc.). The District Judge so stated in his opinion.—(R. 502).

Respondents' brief states, "While riding on the skips the men are subject to the rules and discipline of the Company."

The evidence is undisputed that this is true only to the

extent of providing for the safety of the miners. The rules and regulations of the Company complained of (Defendants' Exhibit No. 1, R. 4453) make this clear, and are, in substance, the same as Rules 55, 58, 63 and 64 as provided by U. S. Department of the Interior, Bureau of Mines, in its Tentative Standards of Safety for Coal Mines.—(Information Circular No. 7204, Sec. 17).

It should be noted also in reference to the matters discussed above, that these or worse condition are and always have been common to all underground iron ore mines and coal mines to such an extent that it is a matter of common knowledge; that these conditions have not been lessened or improved by the institution of "portal to portal." On the other hand, miners, by the recent government-approved bituminous coal contracts, are required to stay underground a total of nine hours with only fifteen minutes for a lunch period; that it was not the purpose of the Congress to legislate in reference to perils and discomforts of work.

"NO FACE TO FACE BASIS OF PAYMENT"

"Face to face" is merely a term. It includes the "working place" of the service employees although it may not be at the "face." The real question is whether the employees were ever paid travel time. Every one of the respondents witnesses questioned on the subject said, "No!"—(R. 2458, 2514, 2671, 2849, 2898-9, 2964, 3058-60, 3122-3, 3145, 3162). The Circuit Court of Appeals said that for twenty-five years before the passage of the Act they had not been compensated for travel time.—(R. 4940). The report to the Administrator upon which his opinion was grounded so stated.—(R. 86).

The definition in the contract tendered by the Union after the incentive plan went into operation included the phrase "whether they be paid by tonnage" (R. 4715), and

the written agreement under negotiation for several months prior and executed on October 6, 1938, contained the phrase "whether they be paid by the day or paid on the tonnage basis."—(R. 107).

The fact that the Company did not require the exact time that each man actually worked at the face to be kept and that it did not make deductions for lost time for which the men were not responsible merely shows that it was liberal and prudent, not that it paid for travel time.

The method of keeping accounts or whether the wages were calculated or paid on an hourly or tonnage basis is beside the mark and does not constitute the real question involved in this litigation. The real question is whether travel time was a part of working time. Under the "portal to portal" method it is. Under the "face to face" method it is not. However liberal the Company may have been in giving a full day's pay estimated on eight hours spent at the working place, although the men in instances (the members of the productive crews who necessarily left the face before shots were made) did not actually work a full day, it is undisputed that they received no pay for travel time. It is likewise undisputed that whenever an employee was required to work over time and beyond the eight hours he received overtime compensation.—(R. 795, 3554-6).

All references and citations in respondents' brief relate to working less than the eight hours.

"TONNAGE OR CONTRACT OR TASK BASIS"

This is an effort to support one of the untenable reasons assigned by the District Court for finding that there was no such custom as asserted by the petitioners.—(Petitioners' Brief, p. 61).

It is wholly irrelevant to that question whether the men

are paid on a tonnage, contract, task or time basis. In either case their time and a half compensation must be computed and paid both under the statute and the contracts.

The standard provision for the computation of working time in all the contracts is expressly made applicable to "all classes of labor * * * whether they be paid by the day or be paid on the tonnage basis."—(R. 107).

The statements of respondents in reference to the incentive plan which was put into operation in 1936 are misleading and inaccurate.

It is true that in 1936 the miners struck against the incentive plan. The men did not lose the strike. The Union contracted with Governor Graves and the Company to give the incentive plan a four months trial, returned to work under the plan (which was based in every aspect—job evaluation, fixing of standards of production, wage scales, cycle of operations, etc.,—on eight hours at the usual working place) and have continued to work under the plan until the present time.

That the plan is good can be determined, if the Court is interested, by reading it (R. 3957), and the explanation given of it to the Unions (R. 3638, 3648), and by the testimony of Mr. Halfpenny (R. 1787-1824). That the Union was itself convinced of its good is demonstrated by the result of the four-months trial and by the fact that every written contract made with the Unions since 1936 (including the contract of May 5, 1941, R. 4625) provides for working under it and thereby gives full approval to it.

If the Court can take judicial knowledge of the fact, it is a fact that the CIO Union thinks so well of the incentive plan that it now has pending before the War Labor Board a demand that it be extended to the manufacturing plants and other operations of the Company.

The evidence is also undisputed that under the plan the miners were not only guaranteed a minimum wage based on 80 per cent of a normal day's work, but they actually received under it about 15 per cent increase in earnings.—(R. 1797).

The incentive plan is neither difficult to understand or to describe. It was, briefly stated, a system whereby the employees were guaranteed certain occupational rates per hour for eight hours work at their usual working places underground. In addition to these guaranteed occupational rates, if the mine crews produced over a certain number of tons, which was called a standard production or base tonnage, they received extra compensation for that tonnage.—(R. 849, 3957).

In fixing the occupational rates each job was valued separately on an eight-hour day and all calculations excluded traveling time.—(R. 1792-3).

The record further shows that the rate was calculated on "production" and was "an evaluated rate for that job for eight hours work on that kind of work."

The proposed incentive plan made this clear.—(R. 3957-8).

"CONTRACTUAL RELATIONS"

The respondents do not deny that the agreement of October 6, 1938 (R. 107) was fairly arrived at by the process of collective bargaining. They could not well do so.—(Respondents' Brief, p. 4).

It contained the same definition of working time as the proposed contract tendered by the Union itself in 1936 (Id. p. 39).

Surely it is not to have less weight because it was the

first formal written contract executed by the Company and the Union through the process of collective bargaining. If contracts do not all have the same sanctity, the Union certainly should regard such a contract as inviolable.

Undoubtedly collective bargaining had been practiced in the bituminous industry much longer. For that reason its customs and methods had received greater attention from the public and administrative authority. But the Congress could not have intended to permit one rule for the computation of working time in an industry which had long practiced collective bargaining and require a different rule in an industry in which the practice had just begun, immemorial custom having been the same in both.

We are indebted to the respondents for printing the dissenting opinion of Messrs. Meany and Woll of the War Labor Board on the Portal to Portal question. It shows the precise similarity between the bituminous and ore industries on the question here, except that the discomforts and hazards are greater in the bituminous mines than in the ore mines.

As a matter of fact the management of the Tennessee Company had negotiated with the committees of the Unions since they first began to organize the employees in 1933.—(Petitioner's Brief, pp. 37-41).

The respondents say it refused to recognize the Union until it executed the contract of 1938 with it.

Just what constitutes Union recognition may be debatable. The respondents quote excerpts which, standing alone, might give the impression that management refused to meet or negotiate with the committees of the Union.

The record establishes exactly the contrary. It shows not only that the Company was "entirely willing to deal" with the committee on matters of collective bargaining, but

that it did so.—(R. 3605, 3603-20, 3626, 3636-3686, 3687-90, 3693-3703, 3708-3721, Stipulation of Counsel, R. 688-692); it shows that petitioner engaged in constant and continuous negotiations with the two Unions; that regular meetings were held at frequent intervals with the committees and officials of the Unions by the Division Superintendents and their staffs, and at regular stated times with the General Superintendent of Ore Mines and Quarries, and on occasions with the President of the Company.—(R. 3591-3604, 3619, 3648-86, 4469, 4471-4504).

In addition to the meetings represented by the minutes referred to above, from July 6, 1934, until the date of trial in July, 1941, the record discloses written minutes of 204 meetings of the officials of the Company with the committees of the Unions.—(Stipulation of Counsel, R. 688-692).

The record shows that grievances of every conceivable kind and character were presented and disposed of at these meetings. It is submitted that the minutes of all these meetings furnish the strongest kind of negative testimony that the Unions were not even requesting payment for travel time. The Stipulation of Counsel contains the statement:

> "None of the minutes above enumerated (T. C. I. Exhibits 41 to 46, both inclusive) contain any discussion of 'portal to portal'."—(R. 692).

The only times any question was ever presented by the Unions in reference to any claim for payment of travel time were on the three occasions, October 19, 1933, April 13, 1934, and June 13, 1935, when the Smelters Union in its written demands casually requested that "the men enter the mine on their own time and come out on the company time."—(R. 3592, 3595, 3623). It is undisputed on these three occasions no insistence was made upon the suggestion,

and that on May 26, 1936, after the Smelters Union had developed sufficient strength to close down all the iron ore mines on the mountain, in presenting its complete proposed wage agreement, it gave as its own definition of the work day the identical language contained in the traditional coal contracts, and which was, after extensive bargaining, incorporated in the executed contract of 1938.—(R. 3636, 107).

From this time until shortly after the Cornucopia Gold Mines Case neither the Unions nor any employee of petitioner nor the Administrator nor any one else connected directly or indirectly with the Act ever in any way questioned the fairness and legality of computing and paying wages on the "face to face" basis, but, on the other hand, daily gave recognition and consented both expressly and impliedly thereto.

The statements contained in respondents' brief (pp. 15 to 18 and 41 to 42) have no significance as to the claim that there is no history of collective bargaining. While it is true that during this period of time (1933 to 1938) the Company refused to negotiate a contract with the Unions as such, it negotiated with each of the Unions, their officers and committees as representatives of their respective members.

The so-called Perkins letters of understanding not only show bargaining with the Unions, but resulted in a return to work with increased wages on the "face to face" basis, without any request or suggestion being made for the payment of travel time.

II

"ARGUMENT"

(Respondents' Brief, p. 28)

Apparently to give some indirect support to the ruling that the purpose of the Act was to eliminate physical conditions detrimental to the general welfare of the workers, but without venturing directly to support that ruling, the respondents quote in their summary from Section 2 of the Act.

But the "labor conditions" referred to by the Congress were sub-standard wages and excessive working hours. The "labor conditions" referred to by the Court below were the alleged discomforts and hazards of underground travel and the alleged poor ventilation of the mines.

"The maintenance of the minimum standard of living necessary for health and general well-being of workers" can not be construed to mean "the maintenance of physical conditions necessary to safety, comfort and health."

The respondents concede that the Act "does not give a definition of work" and on pages 30 and 31 quote definitions which show that the term may be applied without limit to any conscious effort, physical or mental.

The Congress set no limits. Did it intend that the question should be one of fact to be decided by the triers of fact according to their individual opinions, or a question of law for the court, to be decided according to the concepts, customs, standards, methods and agreements of each industry?

Petitioner respectfully submits that respondents entirely misconstrue the real question under consideration. In doing so they follow the fundamental error committed by the

Circuit Court of Appeals in holding that the question under consideration was one of fact and not of law. The real question here is the intention of the Congress, which, in the enactment of the Act, did not define work, did not limit the time that could be spent underground, as three Western States had done, did not legislate for the "portal to portal" method or against the "face to face" method, and did not delegate to any one the power to determine what constituted work. The Congress realizing that there might be and were, indeed, differences of opinion as to what constituted work, left the subject wholly undefined, and the question is whether it intended the matter to be decided by a trial tribunal in each individual case or to be determined as a question of law.

Simply stated, what constitutes work is a question of law and whether an employee is actually engaged in work becomes a question of fact.

The Congress made no effort to define work in reference to all industries or to any named industry; it did not intend to revolutionize the existing traditional custom as to what constituted work in a particular industry and abrogate existing contracts which defined work in accordance with the traditional existing custom.

Respondents, following the lead of the Circuit Court of Appeals, take the position that the previous traditional custom, the existing contracts, the history of the Act, including the administration of NIRA, the construction by the Administrator of the Act in the case of the bituminous coal mining industry, the practical construction of the parties, the concept of the industry should all be ignored and the question of whether or not travel time is work time should become a question of fact to be determined in each individual case. In seeking thus to ignore the ascertainment of the intent of the Congress respondents misconceive the entire purpose of this litigation.

Petitioners were seeking not a trial of fact as to whether an individual or groups of individuals in a particular mine were working or playing or resting; they were seeking a declaration as to whether or not it was the intent of the Congress that all time spent underground *per se* was work time.

The Circuit Court of Appeals has held that all time spent underground from "portal to portal" is work time. As a ground for this holding it and respondents rely upon testimony depicting the conditions of employment of some of the miners. In doing this they have selected items of testimony which do not comport with the testimony as a whole, as we have demonstrated. In many instances the cited testimony is contradicted or explained in prior or subsequent testimony of the witness quoted from; in most instances the conditions or references selected depict not the average or usual conditions but casual, exceptional and the worst conditions in one particular mine or in one particular portion of one particular mine and present these conditions as existing in and representative of all mines. As to some of the mines of petitioners such conditions never existed (Spaulding of the Republic Company and petitioner's Number 5 Mine). Treating this testimony as an overall picture the Court decreed, by the pooling of scattered evidence that in all mines, due to these conditions, all travel time must be paid for as work time, and thereby has not only turned the case from a petition to declare the intent of the Congress in the enactment of the Act to a fact finding expedition in reference to various individuals.

The distinctions between this case and the cases cited by the respondents were pointed out in our main brief, pp. 64-65.

As the Circuit Court of Appeals pointed out, workmen's compensation cases are not in point.

The Hours of Service Cases are not in point. There is no question here of when employees are "on duty." There is no question of employees filling in time with other work while waiting for their regular work. The purpose of the Hours of Service Act is to prevent the danger which must necessarily arise to the employee and to the public from men continuing in a dangerous and hazardous business for a period so long as to render them unfit to give that service which is essential to the protection of themselves and the public. Employees are defined in the Act as "persons actually engaged in or connected with the movement of any train." The time spent by the trainmen during which they were completely relieved from duty and were not subject to call was held to constitute hours on duty within the sixteen hour provision because of the fact that the period was not long enough to give an opportunity for substantial rest.

The cases cited by respondents show that the purpose of the Hours of Service Act was to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

It is well known that the Congress was moved to enact this legislation on account of the large numbers of disastrous wrecks and other accidents due to tired and overworked employees. Petitioner takes no issue with the statement that "no contract can defeat the will of Congress."—(Petitioners' Brief, pp 42-45). The cases cited in support of this established principle of law have no application here where we are concerned only with the question as to whether or not it was the intent of the Congress to invalidate contracts entered into not in evasion of the law but in accordance with the concepts, customs, standards and methods of the industry and the agreements of the parties clearly arrived at by the process of collective bargaining.

It is said by respondents that the Company has been paying for travel time since May, 1941, without disaster. On account of the penal provisions of the Act it, under compulsion, has been paying for travel time as a temporary measure —with what consequences this record does not disclose.

There have been times, as shown by the evidence in this case, when these mines were not able to operate but a few days a week. When such times recur or, for that matter, when normalcy is restored the question of the loss of from one to two hours of productive work per day may mean the life or death of any industry.

"THE COAL SITUATION"

Petitioner has always taken the position that in ascertaining the intent of the Congress on the sole question here under consideration it must be assumed that the Congress did not intend to have the work "workweek" construed one way in reference to petitioner's underground ore mines and in an exactly opposite way in reference to petitioner's underground coal mines.

It is common knowledge that the public generally has considered the decision in this case as setting a judicial precedent in the case for the construction of Section 7 of the Act in its application to the coal mines. The Court will take judicial knowledge that it was on this construction that the suits referred to were brought.—(Respondents' Brief, p. 47).

Respondents state that "all suits on 'portal to portal' are to be dismissed." They have not up to this moment been dismissed. Should they be dismissed with prejudice this could only dispose of the claims of those who are parties to the proceedings and could not possibly include the several hundred coal mines which were released from government

control because they continued to operate during the last two strikes as non-union operations.

Respondents say that the War Labor Board, the Ickes-Lewis agreement of last November and the agreements under which many of the bituminous mines were returned to the owners all "recognize that travel time is work time."

The War Labor Board ruled that that was a legal question for Court determination.

According to their published terms, the contracts referred to provide complicated formulae for effecting a uniform increase of pay for all on an assumed average of travel time at two-thirds of the rate for production time, regardless of the actual travel time of each employee. That plainly violates the Act according to the decision here for review. Those contracts can only be sustained on the ground that a difficult and complex problem was worked out by the parties concerned through the process of collective bargaining, perhaps somewhat stimulated by the forceful personality of the distinguished Secretary of the Interior.

It is significant that the respondents find it necessary to go to England and to what they term "benighted Europe" for precedents for the portal-to-portal opinion for precedents in the iron ore mines.

They say that the portal-to-portal problem has now been settled for the bituminous industry until March, 1945, and that the iron ore mines have been "paid portal-to-portal" since May 1, 1941.

The ore miners have received portal-to-portal pay since May 1, 1941, under a temporary arrangement induced by the Administrator's modified portal-to-portal opinion (Main Br. p. 5). But the decree grants to the employees an unexpected windfall of nearly three years back pay at a time-and-a-half rate with a double recovery despite the

October, 1938, agreement, since when the respondents say the Union has prospered greatly. They attribute that prosperity to the Wage and Hours Act, although the forty-hour week had already been established in the ore mines before that Act was passed and the employees were receiving far more than the minimum wage prescribed by the Act, and the Union first demanded pay for travel time when the Administrator published said opinion.

Undoubtedly the December agreements in the bituminous coal industry have added to the complexities of the future problem in the iron ore industry. The bituminous miners and the ore miners are now being paid on wholly different bases under the same Act and if the decree under review be affirmed they will continue to be paid on different bases for a time at least in the future. If, however, as we confidently submit, the Act was misinterpreted below, the future problem in the iron ore industry, difficult as it may be, will have to be worked out by the parties concerned through the process of collective bargaining in the light of this Court's construction of the Act, which is not academic and does not depend on hypothetical facts as to the past, present or future, as the lower courts erroneously supposed.

These agreements, if this decision stands, are invalid so far as the individual miner is concerned, and the operators making them have for their protection only the good faith of the Union.

This condition as to which there can be no difference of opinion demonstrates the correctness of petitioner's contention that this question is one that should be left to the process of collective bargaining and that unless this is done the turmoil and chaos which has existed for the last nine months in the coal mining industry will continue to exist.

Respondents stated "that these pressures are being lifted

by private agreement." If the agreements which, in keeping with traditional custom, had been executed in this case had not been declared invalid by this decision the "pressures" referred to would have never existed.

II

REPLY TO INTERVENER'S BRIEF[1]

1. "STATEMENT"

Intervener incorrectly defines the phrases "face to face" and "portal to portal." The terms as commonly used include all underground miners and "face to face" is commonly used as excluding travel time and "portal to portal" as including travel time.

Intervener seeks to make it appear that the men report at the tipple house for work and are from then on subject to the orders of the Company.

On page 5 he says the check-in board tells who are on the job and "ready for work." The supporting references show that the quoted words are supplied by the intervener. Of course the check-in system shows who are in the mine and that is its purpose.

It is said that instructions are given at the portal to "the crew or its head miner." Again, the supporting references show that the word "crew" is supplied by the intervener and that, as would be quite natural, the service foreman and head miners talk with the mine foremen when they meet at the portal and that the latter naturally tell them of roof or other conditions requiring attention, or of a change from one heading to another, and the like.

In the text on page 7 it is said that the men "frequently" pick up tools on the surface, and in the foot note it is said they do this "regularly." As pointed out on page 4,

[1]Printer's proof of intervener's brief was not served on petitioner until January 7, 1944. Time does not permit us to do more than point out some of its erroneous statements and conclusions.

supra, the District Court found that that was done "occasionally" and it is not disputed that the Company provided for the regular transport of the tools to the working places during working hours.

What is said on pages 8 to 10 under the subject of "supervision" shows that the supervision before the men actually report to their superiors at the working places is solely for their own safety and so the intervener virtually admits on page 11.

To support the inference that the men have to report at the portal at a certain time it is said on page 9 that they are subject to discharge if they report late. The supporting reference shows simply that they were expected to be at the working places on time. Of course they were required to catch one of the regular trips but the intervener admits they scheduled themselves.

Intervener laboriously attempts (pp. 18-25) to support the finding of the District Court that there had been no custom to pay the men on the "face to face" method. He says that some were paid on a tonnage or task basis and that the company was thus concerned solely with production—not with the time spent. That overlooks the fact that the time and one-half compensation has to be computed and paid in all cases and that the standard definition of working time in all the contracts is expressly made applicable to all classes of labor whether paid on a time or tonnage basis.

The intervener says that accurate records were not kept of the actual time each man worked at the face. If a man was on the job he was credited with a full day's work without deduction for time when he might not actually be working as where, for their own safety, the men are required to be away from the headings before the "shooting," which regularly occurs five minutes before quitting time, and if

he is not required to light the fuses each man naturally leaves when his particular job is done.

He says (p. 24) the service men can not be paid on the "face to face" since they do not work at the "face." Since the service men have no fixed working places the only practicable method was adopted of having their work day begin when they obtained their tools at the tool boxes and reported to their respective foremen just as the work day of the productive men began when they obtained their tools at the heading and reported to their respective head miners, though a miner might have picked up a few wedges, a piece of drill steel or an oil can on his way to the heading.

He says (p. 24) that if a service man is switched to a production crew he gets paid for his travel time. Again the supporting reference shows that when a service man is thus first assigned to a production crew he is apt to be late in arriving at the heading because he did not get the notice of the shift in time. None the less, he is credited with a full day's work.

Intervener charges that the claim of the "face to face" custom is artificial. He shows his appreciation of its importance by his own artificial and labored reasoning in support of the finding of the District Court. He deals wholly with terminology—not with substance. He ignores the fact that the question of substance is whether there was a custom not to pay the men for travel time. They all say so, and the Circuit Court of Appeals so found.

Intervener does not attack the agreement between the Tennessee Company and the Union of October 6, 1938 on the subject it was not fairly arrived at by the process of collective bargaining. He says (p. 26-27) that "though the Tennessee Company did on occasion meet and talk with Union representatives it refused consistently to recognize the Union as a collective bargaining agent up to the eve of

the enactment of the National Labor Relations Act." Apparently he does not think the Company is entitled to any credit for honestly complying with the law.

The Company had taken the position that it would not deal with the Union as such but did deal with the committees of the Union since it first began to organize the employees in 1933 as the intervener admits. Though he seems to think that an understanding on which the men continued to work or one arrived at by mediation was not a contract, he fails to point out that the Union, as well as the company, addressed a letter to the Department of Labor when the 1934 strike was settled.

Intervener says (p. 30) that from the earliest date the Smelters' Union protested the injustice of requiring the men to travel underground on their own time, which is quite inconsistent with the claim that there had never been a custom not to pay the men for travel time. Again the supporting references show that "the protest" was the inclusion with other demands in 1933, 1934 and 1935 of a formal demand that the men should enter the mine on their own time and leave on company time.

Intervener states that petitioners' Statement of the Case is not only "incomplete and misleading on this aspect of the case (traditional custom and contract), but more importantly they make only passing, superficial reference to the most pertinent and significant evidence in the record—evidence showing what their employees do and conditions to which they are subjected during the time in question."

Petitioner asserts that the reverse is true. The fact in reference to the traditional practice (which are undisputed and correctly stated by petitioners) constitute by far the most pertinent and significant evidence in the record. Not only is this true, but the position now taken by intervener is entirely inconsistent with his position in his "Modified

Portal to Portal Wage-Hour Opinion," his opinion in reference to bituminous coal mines and his answer filed in this case.

The Act was set up on a national industry basis. It has always been and is now being administered on an industry basis. The Administrator has so interpreted it in reference to the bituminous coal mining industry and its application to the precise question here involved.

The Administrator, in his "Modified Portal to Portal Wage-Hour Opinion" correctly based his interpretations on an industry basis but incorrectly made the iron ore mining industry a part of the metal mining of industry of the West, an industry with which it has never had the remotest kinship, competitive or other relationship, and which is located principally in the Western States where, under police power, the States have adopted the policy of prohibiting underground work in excess of eight hours and also expressly including travel time as a part of the permissible underground eight hours.

"A. NATURE AND CONDITIONS OF THE UNDERGROUND TRAVEL IN PETITIONERS' MINES."

With even less accuracy and with more exaggeration than exists in respondents' brief intervener depicts the underground working conditions.

Petitioner's Reply to Respondents' Brief (pp. 5 to 9, supra) is applicable to intervener's brief.

Intervener's brief on its face shows that, as did the Courts below, the intervener, to sustain the judgment against this petitioner, relies on evidence which related solely to other petitioners, and, likewise, to sustain the judgments against other petitioners, evidence which related to petitioners other than that petitioner, and yet now persists, contrary to

his previous attitude, in declining to consider the question, as was the intention of the Congress, on an industry basis and not on an individual basis.

Striking illustrations of this can be found throughout the intervener's brief. In fact, he refers to evidence as to operations "by the Sloss Company" (p. 5), to evidence (p. 12) of head miners (this petitioner alone had head miners), as to different kinds of skips of different companies, of Sloss, of Republic (p. 12), as to the variant distances in different mines (p. 13—but not in reference to the Spaulding Mine where the distance was negligible), to evidence by one witness who, it is stated, testified "to the ever present danger of falling slate," when the citation shows that this evidence applied solely to the Woodward Company and was completely qualified by further testimony of the witness.

The citations as to the manways and "passageways which run up and down hill, paths filled with water, high voltage electric cables," etc. (p. 14) relate to testimony not common to all mines or any one mine but to only a part of one mine —without showing that much of this testimony shows the conditions described were temporary, in some instances the passageway being a temporary one used while a permanent passageway was being built. This is especially true of the steps referred to so grief-strickenly as existing at the Raimund Mine of the Republic Company (p. 15).

The statement recites, as if applicable to petitioner's mines, that "one man out of each crew regularly picked up powder at the powder house en route to the working face." This was the testimony of one witness referring only to one mine of the Sloss Company and was entirely contrary to the undisputed evidence which showed that in this petitioner's mines the powder was and could only be obtained on company time.—(R. 1090).

The illustrations given above of the contents of this statement are typical of the statement.

"B. EVIDENCE OF PETITIONERS' PRACTICES WITH RESPECT TO TRAVEL TIME."

The intervener takes the same position in reference to this as do respondents. The position is clearly untenable. (pp. 10 to 13, supra).

When intervener announced his "Modified Portal to Portal Wage-Hour Opinion" he found that the "face to face" method had traditionally existed in the Alabama mines.

Petitioner was not on trial for violation of the National Labor Relations Act. The length of time of the execution of collective bargaining agreements has no relevant bearing on the intent of the Congress. The real question is whether or not such agreements, when made, in keeping with the traditional practice and concept of the industry were valid within the legislative intent.

"C. THE ADMINISTRATOR'S INTERPRETATIONS"

In explaining, or, as it now appears, apologizing for the Administrator's interpretations it is stated that the proper basis of administering and construing the Act was "on a nation wide basis" and in relation to "practice" in an "industry." This position was correct, and the present position of intervener in an effort to sustain the judgments on an individual basis is out of harmony with the history of the Act, its context and interpretations.

"D. DECISIONS OF THE COURTS BELOW."

It is admitted that these decisions judicially declare that all time spent underground by petitioner's employees in and of itself constitutes work time.

"SUMMARY OF THE ARGUMENT AND ARGUMENT."

Petitioner's reply to the argument of respondents is equally applicable to the Summary of Argument and Argument of intervener.—(pp. 1 to 23, supra).

The intervener attempts (pp. 44-45) to support the ruling below that the employees are entitled to compensation for going to and from work because that is a "process or occupation" necessary to production within the meaning of Section 3 (j).

The respondents made no such claim and admitted that the Congress did not attempt to define "workweek." Its manifest unsoundness shows how far the intervener deems it necessary to go to support the opinion. He lifts the quoted words from their context without quoting the whole section which was a definition of "produced,"—not "work." The statute provides that an employee is deemed to be engaged in the production of goods "if such employee was engaged in producing, manufacturing, mining, handling, transporting or in any manner working on such goods or in any process or occupation necessary to the production thereof." Traveling to and from work is not a "process or occupation" necessary to the production of goods. The quoted words are used to make it plain that production of goods includes all stages of production.

We do not claim, as the intervener supposes, that the statute only applies to productive work.

The intervener cites (p. 54) Arizona, Utah and Nevada statutes as showing the reasonableness and practicability of the "portal to portal" principle. He fails to appreciate the significance of the fact that two states had expressly provided that the eight hour limitation should apply to all

time underground and that one state provided that it should apply only to travel one way.

We are indebted to the intervener for calling attention in the foot note to the fact that Wyoming expressly wrote into its statute the decision of the Supreme Court of California in the Martin case by providing that its eight hour statute "shall be construed to mean eight hours of actual labor and shall not include the time consumed in going to and from work."

With those examples before it the Congress adopted neither but left the matter to be determined not by a jury or other fact finding tribunal, as the lower court thought, but in each industry according to its concept, customs and needs, by the parties concerned through the process of collective bargaining.

It is interesting to note that despite this labored effort to support the finding of the District Court that there was no custom in the petitioner's mines to pay on the "face to face" method intervener is driven abroad from Arizona and Utah for precedent for the "portal to portal" method (p. 54-56).

We do not contend that a statute may be lawfully violated either by custom or agreement.

The claim that the "face to face" method has not been established by "bona fide collective bargaining" is completely refuted by the agreement of October 6, 1938, whose bona fides is not questioned even if it had not been preceded, as we maintain, by five years of real collective bargaining, and even though, as is suggested, it was made because of the Fair Labor Standards Act. We say that it was exactly the sort of agreement that the Congress considered the parties were free to make and was made by collective bargaining in the way contemplated by the Congress.

The fact that the Company complied with the Acts of the Congress—the National Labor Relations Act, and the Fair Labor Standards Act—is not an argument that one would expect the intervener and the respondents to urge against it.

As a matter of fact, the employees had been granted the forty hour week and were receiving much more than the prescribed minimum wage long before the Fair Labor Standards Act was passed, and the question of paying for travel time was not raised by the Union until nearly three years afterwards.

The statement is made, "This case does not involve the bituminous coal mines."

This is true only to the extent that the judgments do not adjudicate the rights of the coal miners or coal mine operators because they are not parties to the litigation. It is entirely incorrect, however, when the question of the intent of Congress is taken into consideration (pp. 21 to 23, supra).

Intervener at this late day admits that his coal mine interpretation was "wrong to the extent that it may be inconsistent with the decisions of the Court's below" (intervener's brief p. 44) and states that "the present Administrator has been prepared to revise it since the decision of the Court of Appeals in the instant case but has refrained from doing so only because of the filing of petition for certiorari in the instant case and because of the pendency of the coal controversy before the War Labor Board." (Int. Br. 44)

It is respectfully submitted that the undisputed facts in reference to the coal mines show that the intervener was right in this decision.—(Petitioner's Brief, pp. 13 to 15, Houck Letter, Petitioner's Brief, p. 67 set seq., Dissenting Opinion of A. F. of L. Members of the National War Labor

Board, Respondent's Brief, p. 51 et seq.). Nothing further is needed to prove the correctness of the coal mine opinion and the incorrectness of the "Modified Portal to Portal Wage-Hour Opinion" in its application to the iron ore mining industry.

III

THE ACT OF FEBRUARY 25, 1920

Our attention has only just been called to the Act of February 25, 1920, to promote the mining of coal and other minerals on the public domain.—(41 U. S. Stat. 437).

Section 30 of that Act, now Section 187, 30 U. S. A., provided that all leases should contain a provision for a "work day" not exceeding eight hours for underground workers.

In the following month after the passage of the Act, Mr. Lewis, President of the United Mine Workers, at the request of the President of the United States, pursuant to the report and award of the Bituminous Coal Commission appointed by the President, signed a wage agreement defining the work day as meaning "eight hours work in the mines at the usual working places."—(R. 4759).

Last March Mr. Lewis was moved by the decision of the Circuit Court of Appeals in the instant case for the first time to demand the "portal to portal" method for the bituminous worker and then not to obtain compensation for the actual travel time of each employee but a uniform increase of pay for all.

On April 1, 1920, the Commissioner of the Land Office issued Circular No-679 containing regulations for leases under the statute of 1920 and a form of lease, and it is a matter of public record in the Land Office that hundreds

of coal leases were made. The United Mine Workers of America mined the coal under those leases and obviously worked under the "face to face" method of computing working time.

There appears to have been no administrative ruling construing the meaning of the term "work day" as used in the Act of 1920. The public officials charged with the administration of the Act, the United Mine Workers and the lessees accepted the standard "face to face" definition as in compliance with the statute.

A practical construction for twenty years by the administrative officers and the parties concerned should have more weight than even a formal administrative ruling.

Respectfully submitted,

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